



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

US EPA RECORDS CENTER REGION 5



468174

DEC 07 2012

REPLY TO THE ATTENTION OF:

S-6J

Grant P. Gilezan  
Dykema  
400 Renaissance Center  
Detroit, MI 48243

RE: United States of America v. Browning Ferris Industries, Inc.,  
Civil Action 92 CV 75460 OT

Dear Mr. Gilezan:

The U.S. Environmental Protection Agency has audited the above-referenced matter for compliance by the Settling Defendants with the financial assurance provisions of the Consent Decree in this matter. EPA has determined that the Settling Defendants have yet to provide an adequate demonstration of financial security, as required under paragraph 81 of the Consent Decree.

Paragraph 81 of the Consent Decree expressly provides that "Settling Defendants shall provide financial security in the amount of \$40 million in one of the forms permitted under 40 C.F.R. § 264.145, including the form of audited financial statements which satisfy the substantive criteria thereof, to assure completion of Work at the Site." In fact, EPA's files do not reflect that a demonstration of financial assurance was made. Please advise if EPA's records are incomplete or in error.

In your November 5, 2012 email response to EPA's request to provide documentation proving adequate financial security, you stated on behalf of the Settling Defendants that:

This confirms that my client group is relying on the audited statements of its Group members to meet the substantive criteria of the financial test and corporate guarantee set forth in 40 CFR 264.145, all in accordance with paragraph 81 of the consent decree . . . .

The email included a link to Ford's current SEC 10-K Report as an example "audited financial statement" and stated that this information was being provided to meet the financial test and corporate guarantee per the Consent Decree. Be advised that the link does not provide the information required by 40 C.F.R. § 264.145(f)(1) - § 264.145(f)(11) and any information it does contain are not in the form required by the above-referenced sections.

In an email dated November 6, 2012 after being informed that the submittal did not satisfy the requirements of the Consent Decree and U.S. EPA, the Settling Defendants provided the following rationale for not producing audited financial statements:

Paragraph 81 of the consent decree was negotiated specifically to eliminate the need for such a CFO letter and other requirements in the federal regulations for meeting the financial test and corporate guarantee option. This is reflected by the provision saying that audited financial statements may be used to meet the "substantive criteria" of the referenced federal regulations. By agreeing to include this specification in paragraph 81, the parties intended for the consent decree to operate in the same efficient manner as CERCLA allows parties to meet substantive criteria instead of having to address all elements necessary to secure a permit or comply with a regulation.

EPA disagrees with the Settling Defendants' reading of paragraph 81. Compliance with paragraph 81 can only be satisfied by providing financial security in one of the forms permitted under 40 C.F.R. § 264.145, including the form of audited financial statements that satisfy the substantive criteria of 40 C.F.R. § 264.145(f)(1). Nothing in the language of paragraph 81 eliminates the obligation to provide "audited financial statements" in accordance with the procedures of 40 C.F.R. § 264.145(f)(3).

EPA encourages the Settling Defendants to come into compliance with the requirements of paragraph 81 of the Consent Decree. Failure to submit audited financial statements that satisfy the substantive criteria of 40 C.F.R. § 264.145(f)(1) in the form required by 40 C.F.R. § 264.145(f)(3) will be interpreted as a refusal by the Settling Defendants to provide the necessary financial assurance information, and will be considered grounds for invoking the dispute resolution provisions under paragraph 42 of the Consent Decree.

EPA acknowledges that the current status of the remedial action may not warrant \$40 million in financial assurance, and is willing to negotiate a modification to the Consent Decree to allow a different amount and future adjustments consistent with 40 C.F.R. § 264.145(f)(9). Please communicate directly with EPA's attorney, Jeffrey A. Cahn, regarding this matter, and copy the Remedial Project Manager, Mr. William J. Ryan, on any written communications.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard C. Karl".

Richard C. Karl, Director  
Superfund Division

Cc: William J. Ryan, SC-6J  
Jeffrey A. Cahn, C-14J